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**FILED**

DISTRICT COURT OF GUAM

JUN - 2 2006

**MARY L.M. MORAN**  
**CLERK OF COURT**

**DISTRICT COURT OF GUAM**

**TERRITORY OF GUAM**

JULIE B. SANTOS AND CHARMAINE  
 R. TORRES, on behalf of themselves and a  
 class of others similarly situated,

Petitioners,

-vs-

FELIX P. CAMACHO, Governor of Guam;  
 ART ILAGAN, Director of Department of  
 Revenue and Taxation; LOURDES M.  
 PEREZ, Director of Department of  
 Administration; and, GOVERNMENT OF  
 GUAM,

Respondents.

CIVIL CASE NOS. 04-00006 and 04-00038

**JOINT MOTION OF THE SANTOS AND  
 TORRES PARTIES FOR CONDITIONAL  
 CERTIFICATION OF THE EIC CLASS  
 FOR SETTLEMENT PURPOSES**

**[ORAL ARGUMENT REQUESTED]**

1 **MOTION**

2 On April 6, 7, and 8, 2006, the parties to these three consolidated cases participated in  
3 mediation in Guam before the Hon. William J. Cahill (Ret. Judge). As a result of the mediation,  
4 parties in the *Santos* and *Torres* actions reached a settlement agreement in principle, subject to  
5 final documentation and the Court's approval.  
6

7 On May 26, 2006 the parties submitted their Settlement Agreement to the Court. The  
8 parties also submitted a Joint Motion of the *Santos* and *Torres* Parties for Preliminary Approval  
9 of Class Action Settlement Agreement; Memorandum of Points and Authorities in Support  
10 Thereof ("Joint Motion for Preliminary Approval"), and Joint Petition for Declaratory and  
11 Injunctive relief, and/or for Recovery of Earned Income Tax Credits, or in the Alternative for a  
12 Writ in the Nature of Mandamus ("Joint Petition"). Pursuant to Settlement Agreement ¶ II (a)  
13 (iii), the *Santos* and *Torres* Petitioners now jointly move the Court for an order conditionally  
14 certifying the EIC settlement class.  
15

16 This Joint Motion is based upon the following memorandum of points and authorities, the  
17 files and record in this action, and such other evidence and arguments as may be presented at or  
18 before the hearing on this motion.  
19

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I. INTRODUCTION**

22 The Petitioners in the *Santos* and *Torres* actions respectfully submit this Memorandum of  
23 Points and Authorities in support of their Joint Motion of the *Santos* and *Torres* Parties for  
24 Conditional Certification of the EIC Class for Settlement Purposes. As provided in the Settlement  
25 Agreement, the Joint Motion for Preliminary Approval and the Joint Petition, the EIC class  
26 requested to be conditionally certified is defined as follows:  
27

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1 [A]ll persons who do not elect to request exclusion from the class  
2 under the procedures described [in the Settlement Agreement] and:  
3 (1) were subject to the Guam Territorial Income Tax ("GTIT")  
4 established in 48 U.S.C. § 1421i for tax years 1995-1996 and/or  
5 1999-2004 and would have been eligible to file (whether or not they  
6 actually filed) for the EIC established in 26 U.S.C. § 32 (as it  
7 applied in each respective tax year) if that program were applied in  
8 the Territory of Guam; and/or (2) were eligible to receive an EIC  
9 credit under certain Guam territorial laws for tax years 1995-1996  
10 and/or 1999-2004 that mirrored the federal EIC law (26 U.S.C. §  
11 32), including the Guam Earned Income Program (Chapter 42 of 11  
12 G.C.A.); and/or (3) actually filed a claim for the EIC with DRT for  
13 tax year 1998 under the GTIT or Guam Earned Income Program  
14 (Chapter 42 of 11 G.C.A.) on or before April 15, 2002 and have not  
15 yet received full payment for that claim; and/or (4) actually filed a  
16 claim for the EIC with DRT for tax year 1997 under the GTIT or  
17 the Guam Earned Income Program (Chapter 42 of 11 G.C.A.) on or  
18 before April 16, 2001 and have not yet received full payment for  
19 that claim.

20 Conditional certification is appropriate pursuant to Rule 23 of the Federal Rules of Civil  
21 Procedure because the EIC class represented by the Petitioners is so numerous such that joinder  
22 of each member of the class is impractical, there are common questions of law and fact common  
23 to the class, the Petitioners' claims are typical of the claims of the class members, and the  
24 Petitioners can and will fairly and adequately protect the interests of the class. Additionally, the  
25 Petitioners are represented by able and well-qualified counsel.

26 A class action is superior to other available methods for the fair and efficient adjudication  
27 of this controversy. The prosecution of separate actions by individual members of the class would  
28 create a risk of inconsistent or varying adjudications with respect to individual members of the  
class which would establish incompatible standards of conduct for the party opposing the class.  
The acts or omissions complained of in the Joint Petition are applicable generally to the class  
thereby making appropriate final relief with respect to the class as a whole. Furthermore,  
adjudications with respect to individual members of the class would as a practical matter be

1 dispositive of the interests of the other members not parties to the adjudication or substantially  
2 impair or impede their ability to protect their interests.

3 As set forth in further detail in this filing, the Petitioners submit that the requirements for  
4 conditional certification of the EIC class for settlement purposes have been met.

## 5 **II. SUMMARY OF THE LITIGATION**

6 The Court already is familiar with the lengthy history of this litigation, initiated first with  
7 the *Santos* action in February 2004, followed by the *Torres* action in August 2004, and then the  
8 (non-settling) *Simpao* action in December 2004. This litigation involves the Government of  
9 Guam's alleged non-payment of Earned Income Tax Credits to eligible Guam taxpayers.  
10

11 The Court consolidated the cases for pretrial purposes in March 2006, and granted the  
12 Governor of Guam's request for mediation under Local Rule 16.6. *See* Order Re: Settlement  
13 Conference Pursuant to Local Rule 16.6 (March 21, 2006). The parties agreed on a mediator and  
14 engaged in mediation; however, only parties to the *Santos and Torres* actions were able to  
15 successfully reach a settlement, which then resulted in execution of the Settlement Agreement  
16 now being presented to the Court.  
17

18 Prior to the execution of the instant Settlement Agreement, two prior settlement  
19 agreements were entered into in the *Santos* action, one in 2004, the other in 2005. Compared to  
20 the settlement reached in the *Santos* case on June 20, 2005 (the "2005 Settlement Agreement"),  
21 the instant Settlement Agreement involves parties to both the *Santos and Torres* actions. As  
22 stated above, it was the result of mediation held in Guam over three (3) full days, from April 6-8,  
23 2006, before a distinguished JAMS mediator, the Hon. William J. Cahill. The agreement enlarges  
24 the putative class that will benefit from the settlement while providing enhanced benefits to the  
25 putative class compared to the benefits provided for under the 2005 Settlement Agreement.  
26  
27

1 On May 26, 2006 the parties submitted the instant Settlement Agreement to the Court. In  
2 addition the parties submitted, *inter alia*, a Joint Petition for Declaratory and Injunctive Relief,  
3 and/or for Recovery of Earned Income Tax Credits, or in the Alternative for a Writ in the Nature  
4 of Mandamus.

5 The class Petitioners seek to certify is believed to consist of more than ten thousand  
6 (10,000) taxpayers entitled to and qualified to receive EIC. The Petitioners and each EIC class  
7 member were denied the full implementation of the earned income tax credit as applied to Guam,  
8 including the Government's prohibition or prevention of EIC class members to file claims for  
9 earned income tax refunds, and/or the Government's denial or failure to pay earned income tax  
10 credits to otherwise qualified Guam taxpayers. No conflicts of interest exist between the  
11 Petitioners and the EIC class members. Petitioners have vigorously pursued this action on behalf  
12 of themselves and the EIC class members. Petitioners request that the Court grant conditional  
13 certification of the EIC class for settlement purposes.  
14

15  
16 **III. ARGUMENTS SUPPORTING CONDITIONAL CERTIFICATION OF THE**  
17 **EIC CLASS FOR SETTLEMENT PURPOSES**

18 Certification is appropriate under Rule 23 of the Federal Rules of Civil Procedure which  
19 sets forth a two step procedure for certifying a class. First, the party seeking to certify the class  
20 must make a prima facie showing of each of the requirements of Rule 23(a): numerosity,  
21 commonality, typicality, and adequacy. *Blackie v. Barrack*, 524 F.2d 891, 901 (9<sup>th</sup> Cir. 1975).  
22 Rule 23(a) of the Federal Rules of Civil Procedure states:  
23

24 One or more members of a class may sue or be sued as  
25 representative parties on behalf of all only if (1) the class is so  
26 numerous that joinder of all members is impracticable, (2) there are  
27 questions of law and fact common to the class, (3) the claims or  
28 defenses of the representative parties are typical of the claims or

1 defenses of the class, and (4) the representative parties will fairly  
2 and adequately protect the interests of the class.

3 Once these four requirements are met, a plaintiff must show that the lawsuit qualifies for  
4 class action status under one of the possibilities in found in Rule 23(b). *In re Methionine Antitrust*  
5 *Litigation*, 204 F.R.D. 161, 163 (2001). Rule 23(b) states:

6 An action may be maintained as a class action if the prerequisites of  
7 subdivision (a) are satisfied, and, in addition: (1) the prosecution of  
8 separate actions by or against individual members of the class  
9 would create a risk of (A) inconsistent or varying adjudications  
10 with respect to individual members of the class which would  
11 establish incompatible standards of conduct for the party opposing  
12 the class, or (B) adjudications with respect to individual members  
13 of the class would as a practical matter be dispositive of the  
14 interests of the other members not parties to the adjudications or  
15 substantially impair or impede their ability to protect their interests;  
16 or, (2) the party opposing the class has acted or refused to act on  
17 grounds generally applicable to the class, thereby making  
18 appropriate final injunctive relief or corresponding declaratory  
19 relief with respect to the class as a whole; or the court finds that the  
20 questions of law or fact common to the members of the class  
21 predominate over any questions affecting only individual members,  
22 and that a class action is superior to other available methods for the  
23 fair and efficient adjudication of the controversy...

24 In ruling on a motion for class certification, the substantive allegations in a plaintiff's  
25 complaint must be accepted as true. *Blackie v. Barrack*, 524 F.2d 891, 901 n. 7 (9<sup>th</sup> Cir 1975). The  
26 court may not consider the merits of plaintiff's case in determining the certification motion. *Eisen*  
27 *v. Carlisle & Jacquelin*, 417 U.S. 156, 177-178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Rather,  
28 the only issue on point for class certification is whether plaintiffs assert a claim which, assuming  
its merit, satisfies the requirements of Rule 23. *Id.* at 178.

#### 29 A. Rule 23(a) criteria

##### 30 1. NUMEROSITY

31 The first prerequisite is that the class is so numerous that joinder of all members would be  
32 impracticable. Plaintiffs need not, however, allege the precise number or identity of class  
33 members.



1 members for class certification. Rather, a finding of numerosity may be supported by common  
2 sense assumptions. *In re Playmobil Antitrust Litigation*, 35 F.Supp.2d 231, 239 (E.D.N.Y.1998).  
3 The exact number of class members required for certification of a class has not been defined. A  
4 class with more than forty members is generally sufficiently numerous that joinder is considered  
5 impracticable. *Paper Systems, Inc. v. Mitsubishi Corp.*, 193 F.R.D. 601, 604 (E.D. Wis. 2000).  
6 Classes numbering in the hundreds have routinely satisfied the numerosity requirement. *In re Flat*  
7 *Glass Antitrust Litigation*, 191 F.R.D. 472 (E.D. Pa. 1999).

9 The EIC class is believed to consist of more than ten thousand (10,000) taxpayers entitled  
10 to and qualified to receive earned income tax credits. The class Petitioners seek to certify is so  
11 numerous such that joinder of each member of the class is impracticable.

## 12 2. COMMONALITY

14 The second prerequisite for class certification is that there are questions of law or fact  
15 common to the class. The requirement that common questions of law or fact exist among class  
16 members is satisfied if the named plaintiffs share at least one question of fact or law with the  
17 grievances of the class. *In re Flat Glass Antitrust Litigation*, 191 F.R.D. 472, 478 (E.D. Pa. 1999).  
18 Petitioners and each EIC class member have been denied the full implementation of the earned  
19 income tax program as applied on Guam, including the Government's prohibition or prevention  
20 of EIC class members to file claims for earned income tax refunds and/or the Government's  
21 denial or failure to pay earned income tax refunds to otherwise qualified Guam taxpayers.  
22 Common questions of law or fact exist among the Petitioners and the EIC class members.

## 24 3. TYPICALITY

25 The third prerequisite for class certification is that the claims or defenses of the  
26 representative parties are typical of the claims or defenses of the class. Typicality focuses on  
27

1 whether the individual claim of the class representatives has the essential characteristics common  
2 to the claims of the class. *In re Flat Glass Antitrust Litigation*, 191 F.R.D. 472, 479 (E.D. Pa.  
3 1999). The typicality requirement has been liberally construed by the courts. *Scholes v. Stone*,  
4 143 F.R.D. 181, 185 (N.D.I. 1992); *Mersay v. First Republic Corp.*, 43 F.R.D. 465, 468  
5 (S.D.N.Y. 1968). Courts have uniformly held that claims and defenses are typical if they stem  
6 from the same event, practice, or course of conduct that forms the basis for the claims of the class  
7 and are based upon the same legal or remedial theory. *Rosario v. Livaditis*, 963 F.2d 1013, 1018  
8 (7<sup>th</sup> Cir. 1992). The purpose of the typicality requirement is to assure that the interests of the  
9 named representative aligns with the interest of the class. Petitioners and each EIC class member  
10 have been denied the full implementation of the earned income tax program as applied on Guam,  
11 including the Government's prohibition or prevention of EIC class members to file claims for  
12 earned income tax refunds and/or the Government's denial or failure to pay earned income tax  
13 refunds to otherwise qualified Guam taxpayers. The claims of the Petitioners are typical of the  
14 claims of the EIC class.  
15

#### 17 4. ADEQUACY

18 The fourth prerequisite for class certification is that the representative party will fairly and  
19 adequately represent the class. Parties are generally considered to be adequate representatives of  
20 absent class members if there are no conflicts of interest between the representatives and class  
21 members, and if the court is persuaded that counsel for the representatives will vigorously pursue  
22 the action. A class representative must be part of the class and possess the same interest and  
23 suffer the same injury as the class members. *East Tex. Motor Freight System, Inc. v. Rodriguez*,  
24 431 U.S. 395, 403, 97 S.Ct. 1891, 1896 52 L.Ed.2d 706 (1974). Petitioners and each EIC class  
25 member possess the same interest in recovering earned income tax credits and in compelling the  
26  
27



1 implementation of the earned income tax credit program. Petitioners and each EIC class member  
2 have suffered the same injury. Additionally, no conflicts of interest exist between the Petitioners  
3 and the EIC class members. The Petitioners, directly and through counsel, have vigorously  
4 pursued this action on behalf of themselves and the class members, as is demonstrated by the case  
5 histories, followed by the submission of the instant Settlement Agreement  
6

7 **B. Rule 23(b) criteria**

8 Maintenance of this action as a class action is permitted pursuant to Rule 23(b) based  
9 upon the following: (i) the minimal interest of members of the EIC class in individually  
10 controlling the prosecution of separate actions; (ii) the extent and nature of the litigation  
11 concerning the controversy already commenced by members of the Petitioners; (iii) the  
12 desirability of concentrating the litigation of the claims in this Court; (iv) the difficulties unlikely  
13 to be encountered in the management of this class action; (v) the interest of the Petitioners and the  
14 EIC class members in avoiding inconsistent rulings regarding the Respondents' conduct; (vi) the  
15 questions of law or fact common to the members of the EIC Class predominate over any  
16 questions affecting only individual members, and, (vii) this class action is superior to other  
17 available methods for the fair and efficient adjudication of the controversy.  
18

19 **IV. CONCLUSION**

20 For the reasons stated herein, the Petitioners respectfully request that the Court grant  
21 conditional certification of the EIC class for settlement purposes.  
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1 Respectfully submitted this 2<sup>nd</sup> day of June, 2006.

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3  
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